



October 1, 2018

The Honorable Robert “Bobby” Scott
Ranking Member
Committee on Education and the Workforce

The Honorable Mark Takano
Ranking Member
Subcommittee on Workforce Protections

U.S. House of Representatives
Washington, D.C. 20515

Dear Representatives Scott and Takano:

Thank you for your letter of September 21, 2018, regarding the Pocahontas Coal Company (Pocahontas). Today, Affinity Mine (Affinity), operated by Pocahontas, is among the safest mines in West Virginia. Affinity has among the lowest rates in its Mine Safety and Health Administration (MSHA) District and its national peer group of 175 to 250 employees for Percentage of “Significant and Substantial” (S&S) Citations and Lost Time Accident Severity Rate. The mine also showed significant improvement in the All-Injuries Incident Rate. Please refer to the tables below.

Percentage of Citations/Orders Issued as Significant & Substantial (FY)

Rank	Mine ID	Mine Name	2012	2013	2014	2015	2016	2017	2018*
1	4608878	Affinity Mine	21%	28%	17%	10%	11%	11%	8%
2	4801646	Bridger Underground Coal Mine	19%	9%	14%	15%	11%	10%	8%
3	1519515	Mine #4	14%	28%	15%	10%	8%	7%	9%
4	4609217	Powellton #1 Mine	18%	15%	26%	16%	20%	16%	10%
5	4609028	Mountain View Mine	24%	28%	22%	17%	12%	12%	12%
6	3610045	Harvey Mine	na	na	23%	20%	12%	23%	12%
7	1103147	Prairie Eagle-Underground	21%	9%	14%	14%	13%	24%	18%
8	4605252	Beckley Pocahontas Mine	32%	29%	18%	23%	18%	17%	22%
9	4609319	Lower War Eagle	16%	18%	28%	23%	20%	25%	24%
10	1103141	Mach #1 Mine	18%	19%	15%	19%	25%	25%	26%
11	1517741	Paradise #9	28%	32%	37%	25%	24%	36%	29%
12	1202418	Oaktown Fuels Mine No. 2	50%	11%	31%	23%	16%	16%	29%
Group Average			25%	24%	23%	18%	16%	21%	18%

*FY 2018 includes data up to quarter 3 end (6/30/2018)

All-Injuries Incident Rate (FY)

Rank	Mine ID	Mine Name	2012	2013	2014	2015	2016	2017	2018*
1	4801646	Bridger Underground Coal Mine	4.61	4.24	5.01	4.32	5.07	3.10	1.30
2	4605252	Beckley Pocahontas Mine	5.08	2.19	1.39	1.85	2.84	5.04	2.73
3	1202418	Oaktown Fuels Mine No. 2	-	4.15	2.29	4.78	4.38	4.81	3.16
4	3610045	Harvey Mine	na	na	3.60	3.62	2.01	2.92	3.33
5	1103147	Prairie Eagle-Underground	11.35	6.54	3.50	7.04	3.25	4.55	3.70
6	4608878	Affinity Mine	9.91	6.93	3.37	5.07	4.11	6.50	3.85
7	4609217	Powellton #1 Mine	6.74	9.56	1.69	10.21	7.27	4.72	4.27
8	1517741	Paradise #9	6.56	3.85	3.64	3.33	2.68	3.36	4.35
9	1519515	Mine #4	-	12.77	4.23	3.67	5.79	7.97	4.47
10	4609028	Mountain View Mine	12.64	6.71	4.22	3.76	9.87	4.72	4.68
11	4609319	Lower War Eagle	1.45	9.21	6.35	5.01	7.46	7.16	4.93
12	1103141	Mach #1 Mine	7.02	3.14	4.05	5.10	4.00	4.51	5.76
Group Average			7.12	5.83	3.65	4.66	4.82	4.90	3.88

*FY 2018 includes data up to quarter 3 end (6/30/2018)

Lost Time Accident Severity Rate (FY)

Rank	Mine ID	Mine Name	2012	2013	2014	2015	2016	2017	2018*
1	4801646	Bridger Underground Coal Mine	613.61	67.82	656.18	282.26	247.73	2,369.48	1.30
2	4608878	Affinity Mine	281.09	5,532.57	47.19	26.80	257.56	81.80	70.09
3	4609319	Lower War Eagle	1.45	916.32	429.80	280.94	3,302.56	762.96	88.82
4	1202418	Oaktown Fuels Mine No. 2	na	-	44.60	317.11	247.62	397.45	98.76
5	3610045	Harvey Mine	na	na	245.71	170.83	165.38	268.37	122.67
6	1103147	Prairie Eagle-Underground	441.88	359.94	163.42	179.15	381.06	117.50	132.81
7	4605252	Beckley Pocahontas Mine	1,935.62	377.96	150.45	91.32	152.61	2,453.33	139.30
8	4609028	Mountain View Mine	506.22	251.38	2,655.38	0.84	320.16	43.37	145.68
9	1103141	Mach #1 Mine	221.42	129.26	234.69	84.09	96.44	72.47	153.19
10	1517741	Paradise #9	145.59	90.29	102.19	980.56	94.31	257.18	171.17
11	1519515	Mine #4	na	432.83	258.40	221.11	293.60	315.91	213.50
12	4609217	Powellton #1 Mine	669.90	896.09	116.02	445.98	360.68	1,019.00	248.70
Group Average			623.46	857.78	415.01	267.78	462.98	678.12	132.84

*FY 2018 includes data up to quarter 3 end (6/30/2018)

Over the past five years—while Affinity was designated by MSHA as a Pattern of Violations (POV) recipient—MSHA and Affinity have worked together to make remarkable progress both in compliance and accident prevention. During this time, MSHA inspected Affinity over 400 times for specific issues and completed 20 inspections of the entire mine. Further, Pocahontas developed and implemented a successful Corrective Action Program and changed Affinity's management.

It is against this backdrop that career staff at MSHA and career attorneys from the Office of the Solicitor recommended and negotiated a favorable settlement agreement with Pocahontas after nearly five years of being in the POV designation. This agreement accomplished two goals: (i) it fully preserved the POV citations and orders at Affinity, and (ii) it preserved MSHA's future discretion to determine what constitutes a POV. On August 28, 2018, the Federal Mine Safety and Health Review Commission (Commission) dismissed Affinity's appeal at Affinity's request by a 3-1 margin, without any comment from the majority.

The question on appeal before the Commission was whether the Administrative Law Judge (ALJ) in the court below had correctly determined, in a summary decision, that the Secretary had established the existence of a POV at the mine. In a July 13, 2017 open meeting of the Commission, the majority of the Commissioners indicated they would vacate the ALJ's decision and remand the case for further proceedings. Career staff also were concerned that the Commission decision might include language constraining the Department of Labor

(Department) going forward in its discretion to determine what constitutes a POV, which could have made it more difficult for the Department to enforce the rule going forward.

At the time of the settlement, Affinity had been operating under MSHA's POV notice for almost five years—much longer than *any other mine* in the history of POV enforcement—and had significantly improved its safety and health conditions. Rather than waiting for the expected adverse Commission decision that might have contained language that would have constrained MSHA's enforcement ability, the settlement permanently preserved the POV finding in this case and preserved MSHA's ability to enforce the rule in the same manner as it has done historically. It also validated MSHA's efforts over the last five years in enforcing the POV notice at Affinity, which, even though it did not receive an inspection completely free of S&S violations, nonetheless resulted in substantial safety and health improvements for Affinity's miners.

As you may know, the POV final rule itself remains in litigation in the federal district court in the Southern District of Ohio; an adverse decision in the Affinity case potentially could have been used against the Department in that case. In light of the risk to MSHA's most significant enforcement tool and the robust improvement in health and safety at Affinity, the Department exercised its broad discretion to reach a settlement and resolve the litigation in a way that maintained the Department's existing and highly effective enforcement ability.

In response to your document requests, enclosed please find a copy of the settlement agreement, a copy of documents filed with the Commission relating to the settlement, and a news article discussing the Commission's open meeting. As the Department's filings make clear, the Department had been unaware that Pocahontas intended to file its motion and the agreement under seal. The Department did not request that, did not agree to it, and did not believe that filing under seal was necessary or desirable. The Department did, however, wish to support Pocahontas' motion as a general matter, and so filed its initial response under seal as well. (As the filed documents also make clear, all documents were quickly unsealed after the Department clarified it did not believe a reason existed for sealing the documents.) Also, the enclosed public filings reflect all agreements between the Department and Pocahontas.

MSHA remains committed to robust, consistent enforcement of the Mine Act—including issuing POV notices where appropriate—to fulfill its mission to keep the nation's miners healthy and safe. MSHA's successful enforcement of the POV Rule is best illustrated by the dramatic reduction in the number of mines meeting the screening criteria to be considered for a POV. The number of mines that have qualified for further review after meeting the screening criteria has fallen from over 50 in 2010 to none in the last four years. MSHA's successful enforcement of the POV Rule continues to be a valuable tool to protect America's miners.

Sincerely,



David G. Zatezalo
Assistant Secretary of Labor for
Mine Safety and Health Administration

Enclosures

**ATTACHED
DOCUMENT
FILED
UNDER SEAL**

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710

POCAHONTAS COAL COMPANY, LLC)	CONTEST PROCEEDING
)	
Contestant,)	Docket No.: WEVA 2014-395-R
)	Order No.: 3576153; 12/19/13
)	
v.)	
)	
U.S. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA))	
)	
Respondent.)	
)	
U.S. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA))	CIVIL PENALTY PROCEEDING
)	
)	Docket No.: WEVA 2014-1028
)	Docket No.: WEVA 2015-854
Petitioner)	
)	
)	
v.)	
)	
POCAHONTAS COAL COMPANY, LLC)	Mine ID No.: 46-08878
)	Mine: Affinity Mine
)	
Respondent.)	Commission

MOTION TO WITHDRAW PETITION FOR DISCRETIONARY REVIEW

Pocahontas Coal Company, LLC ("Pocahontas"), by and through its undersigned counsel, and pursuant to Federal Mine Safety and Health Review Commission ("Commission") Procedural Rule 10, 29 C.F.R. § 2700.10, and Commission Procedural Rule 11, 29 C.F.R. § 2700.11, hereby moves for an order granting its Motion to Withdraw Petition for Discretionary Review as more fully set forth below. Pocahontas files this motion under seal.

INTRODUCTION

On October 24, 2013, the Mine Safety and Health Administration (“MSHA”) issued Section 104(e)(1) Written Notice Number 7219153 (“POV Notice”) to Pocahontas’ Affinity Mine alleging a pattern of violations (“POV”) existed at the mining operation. MSHA issued the POV notice pursuant to Section 104(e)(1) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”) (30 U.S.C. § 814(e)(1)). On December 31, 2015, Pocahontas filed with the Commission a Petition for Discretionary Review (“PDR”) pursuant to Commission Procedural Rule 70 (29 C.F.R. § 2700.70). This PDR related to the POV Notice and two decisions issued by Administrative Law Judge on November 3, 2015 and December 24, 2015.

The parties have now negotiated a compromise of this matter and have agreed to resolve the issues raised in Pocahontas’ PDR and the related briefs before the Commission. Accordingly, Pocahontas respectfully moves the Commission for an order granting its Motion to Withdraw Petition for Discretionary Review and states each party will bear its own costs and fees in these proceedings. A copy of the Settlement Agreement is filed separately under seal to this motion as Exhibit 1. Counsel for Pocahontas has informed counsel for the Secretary of its intent to file this motion.

ARGUMENT

Pocahontas seeks to withdraw its PDR based entirely on the terms of the Settlement Agreement between the parties. Commission Procedural Rule 11 provides that “[a] party may withdraw a pleading at any stage of a proceeding with the approval of the Judge or the Commission.” See 29 C.F.R. § 2700.11; see also Fed. R. App. P. 42(b) (noting in part that “[a]n

appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court").¹

Commission precedent sets forth the right of a party to request permission to withdraw its petition for discretionary review. See Speed Mining, Inc., 27 FMSHRC 286 (Mar. 2005) (granting motion to withdraw petition for discretionary review filed pursuant to Commission Rules 10 and 11); Newmont Gold Company, 21 FMSHRC 564 (June 1999) (granting motion to withdraw as it neither disturbed the holdings of the judge nor the penalties assessed); Thunder Basin Coal Company, 1996 WL 354599 (June 1996) (granting unopposed motion to withdraw petition for discretionary review); RNS Services, Inc., 18 FMSHRC 115 (Feb. 1996) (granting unopposed motion to withdraw petition for discretionary review); Jim Walter Resources, Inc., 9 FMSHRC 390 (Mar. 1987) (granting unopposed motion to withdraw petition for discretionary review and to dismiss proceeding); Russell Collins and Virgil Kelley, 5 FMSHRC 1671 (Oct. 1983) (granting motion to withdraw petition for discretionary review).

The Commission has also recognized that a proceeding "no longer present[s] a justiciable controversy" and "[a] case is moot when the issues presented no longer exist or the parties no longer have a legally cognizable interest in the outcome." See Brent Roberts, 20 FMSHRC 1245, 1247-48 (Nov. 1998); see also Youghiogeny & Ohio Coal Company, 7 FMSHRC 200 (Feb. 1985) (finding adequate reason to grant motion to dismiss proceeding filed by Secretary after petition for discretionary review filed by operator when "there is no longer a true adversarial contest suitable for judicial resolution").

¹ Commission Rule 1(b) provides that Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure shall apply "so far as practicable" in absence of applicable Commission rules. See 29 C.F.R. § 2700.1(b).

CONCLUSION

For the reasons set forth above Pocahontas requests that the Commission issue an order granting its Motion to Withdraw Petition for Discretionary Review.

Respectfully submitted,

POCAHONTAS COAL COMPANY, LLC
Contestant,

BY COUNSEL

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Date: July 10, 2018

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710**

POCAHONTAS COAL COMPANY, LLC)	CONTEST PROCEEDING
)	
Contestant,)	Docket No.: WEVA 2014-395-R
)	Order No.: 3576153; 12/19/13
v.)	
)	
U.S. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA))	
)	
Respondent.)	
)	
U.S. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA))	CIVIL PENALTY PROCEEDING
)	
)	Docket No.: WEVA 2014-1028
)	Docket No.: WEVA 2015-854
Petitioner)	
)	
v.)	
)	
POCAHONTAS COAL COMPANY, LLC)	Mine ID No.: 46-08878
)	Mine: Affinity Mine
)	
Respondent.)	Commission

CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing **MOTION TO WITHDRAW PETITION FOR DISCRETIONARY REVIEW** upon the parties on the **10th day of July, 2018**, via FMSHRC e-filing and electronic mail (where indicated) to:

Lisa M. Boyd
Executive Director
Federal Mine Safety and Health Review Commission
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, D.C. 20004-1710

The Honorable Margaret A. Miller
Administrative Law Judge
Federal Mine Safety and
Health Review Commission
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July 10, 2018

VIA FMSHRC ELECTRONIC FILING

Docket Clerk
Federal Mine Safety and Health Review Commission
1331 Pennsylvania Avenue, N.W. Suite 520N
Washington, D.C. 20004-1710

RE: Pocahontas Coal Company, LLC
Docket No. WEVA 2014-395-R et al.
FILED UNDER SEAL – CONFIDENTIAL DOCUMENT

Dear Docket Clerk:

Attached for electronic filing please find a confidential addendum to Pocahontas Coal Company, LLC's previously filed Motion to Withdraw Petition for Discretionary Review in the above-captioned matter. Pocahontas requests that the attached by "Filed Under Seal" by the Federal Mine Safety and Health Review Commission to preserve the confidentiality of the document.

Thank you for your kind attention to this matter. Please contact me if you have any questions.

Regards,

Jason M. Nutzman

Jason M. Nutzman

JMN

**ATTACHED
DOCUMENT
FILED
UNDER SEAL**

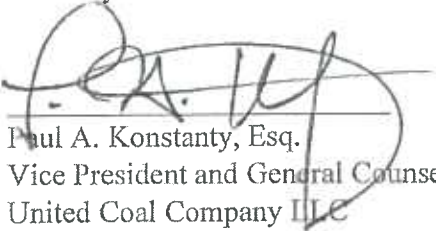
EXHIBIT 1

AGREEMENT

1. This Agreement is being entered into between Pocahontas Coal Company LLC ("Pocahontas") and the Mine Safety and Health Administration ("MSHA") on June 29, 2018 (collectively "Parties").
2. The Parties have agreed to end the matter currently pending before the Federal Mine Safety and Health Review Commission ("Commission") in *Pocahontas Coal Company, LLC v. U.S. Secretary of Labor, Mine Safety and Health Administration (MSHA), WEVA 2014-395-R, et. al.* ("the Proceeding").
3. By entering into this Agreement Pocahontas hereby agrees to file with the Commission a Motion to Withdraw Appeal in the Proceeding.
4. In exchange for Pocahontas filing a Motion to Withdraw Appeal in the Proceeding, and the Commission's issuance of a full, clear, and unambiguous dismissal of the Proceeding, MSHA agrees to immediately terminate Notice of Pattern of Violations Number 7219153 issued at the Affinity Mine on October 24, 2013, and provide prompt written acknowledgment of the same to Pocahontas.
5. The Commission's refusal to fully dismiss the Proceeding renders this Agreement null and void and the parties shall be returned to their original positions in the Proceeding, prior to entering this Agreement, to include waiting on consummation of Pocahontas' appeal before the Commission, any remand or direction by the Commission, or any additional appeals to the United States Court of Appeals and beyond.
6. The Parties will bear their own attorney's fees and litigation expenses for the Proceeding.
7. The Parties agree to keep the contents of this Agreement confidential until such time as the Commission issues a full, clear, and unambiguous dismissal of the Proceeding.

8. The parties agree to execute this Agreement in Counterparts.

Robert H. Beatty, Jr., Esq.
Jason M. Nutzman, Esq.
Attorneys for Pocahontas Coal Co., LLC



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April E. Nelson
Associate Solicitor

Ali A. Beydoun
Counsel, Appellate Litigation

Edward Waldman
Attorney

Attorneys for the Secretary of Labor,
Mine Safety and Health
Administration

8. The parties agree to execute this Agreement in Counterparts.

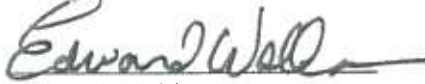
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Administration

FILED UNDER SEAL

FEDERAL MINE SAFETY AND
HEALTH REVIEW COMMISSION

POCAHONTAS COAL CO., LLC,)	
)	
Petitioner,)	
)	
v.)	Docket Nos. WEVA 2014-395-R
)	WEVA 2014-1028
SECRETARY OF LABOR,)	WEVA 2014-854
MINE SAFETY AND HEALTH)	
ADMINISTRATION (MSHA),)	
)	
Respondent.)	
)	

SECRETARY'S RESPONSE IN SUPPORT OF POCAHONTAS' MOTION TO
WITHDRAW PETITION FOR DISCRETIONARY REVIEW

The Secretary supports Pocahontas' July 9, 2018 motion to withdraw its appeal in the above-captioned with the following additional facts:

First, Pocahontas has long since paid in full the proposed penalties with respect to both of the Section 104(e) withdrawal orders before the Commission in this case, *i.e.*, Order No. 3576153 (\$5,600) and Order No. 9001636 (\$764).

Second, the agreement between Pocahontas and the Secretary, a copy of which was attached to Pocahontas' motion to withdraw its appeal, does not reduce or otherwise affect any other contested penalties.

Third, for the same reasons the Commission lacks jurisdiction to review the issuance of a notice of pattern-of-violations, as discussed in *Pocahontas Coal*

Company, 38 FMSHRC 176 (2016), the Commission lacks jurisdiction to review the termination of a notice of pattern-of-violations such as that contemplated by the above-referenced agreement between the parties.

CONCLUSION

Accordingly, the Secretary requests that the Commission grant Pocahontas' motion to withdraw its petition for discretionary review in the above-captioned case.

KATE S. O'SCANNLAIN
Solicitor of Labor

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CERTIFICATE OF SERVICE

I certify that on July 17, 2018, I served a copy of the foregoing response to motion to withdraw petition for discretionary review via electronic mail on:

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/s/Edward Waldman
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Attorney

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

JUL 10 2018

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

POCAHONTAS COAL COMPANY, LLC

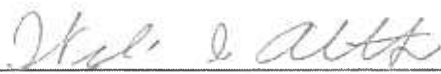
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Docket Nos. WEVA 2014-395-R
WEVA 2014-1028
WEVA 2014-854

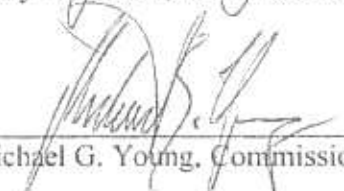
ORDER

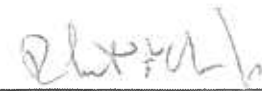
On July 10, 2018, Counsel for Pocahontas Coal Company, LLC ("Pocahontas"), filed a motion "under seal" to withdraw its Petition for Discretionary Review ("PDR") on the grounds that the parties had reached a settlement agreement in the above-referenced cases. On July 17, 2018, the Secretary of Labor filed a response "under seal" in support of Pocahontas' motion to withdraw its PDR. However, neither party filed a motion to file under seal or provided justification for the Commission sealing what would otherwise be publicly available filings.

The Commission directs the parties to file a pleading explaining why the motion and response have been filed "under seal." Parties should explain how sealing these pleadings is consistent with Congressional intent that settlements under the Federal Mine Safety and Health Act of 1977 take place with sufficient transparency so that the public will be aware of the process. The parties' response must be filed within five (5) days of the issuance of this order.


William I. Althen, Acting Chairman


Mary Lu Jordan, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

Distribution:

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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
721 19th Street, Suite 443
Denver, CO 80202-2536

POCAHONTAS COAL CO., LLC,)	
)	
)	
Petitioner,)	
)	Docket Nos. WEVA 2014-395-R
v.)	WEVA 2014-1028
)	WEVA 2014-854
SECRETARY OF LABOR,)	
MINE SAFETY AND HEALTH)	
ADMINISTRATION (MSHA),)	
)	
Respondent.)	
)	

The Secretary was unaware that Pocahontas was going to file its motion to withdraw its PDR under seal, and does not believe that there was any reason for Pocahontas to file the motion (and any attachments) under seal. Consequently, attached to this response is a copy of the Secretary's July 17, 2018 response with the "under seal" designation removed.

/s/Edward Waldman
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CERTIFICATE OF SERVICE

I certify that on July 26, 2018, I served a copy of the foregoing response
(with attachment) to the Commission's July 19, 2018 order via electronic mail
on:

Robert H. Beatty, Jr., Esq.
Jason M. Nutzman, Esq.
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Jason.Nutzman@dinsmore.com
Robert.Beatty@dinsmore.com

/s/Edward Waldman
EDWARD WALDMAN
Attorney

FEDERAL MINE SAFETY AND
HEALTH REVIEW COMMISSION

POCAHONTAS COAL CO., LLC,)	
)	
Petitioner,)	
)	
v.)	Docket Nos. WEVA 2014-395-R
)	WEVA 2014-1028
SECRETARY OF LABOR,)	WEVA 2014-854
MINE SAFETY AND HEALTH)	
ADMINISTRATION (MSHA),)	
)	
Respondent.)	
)	

SECRETARY'S RESPONSE IN SUPPORT OF POCAHONTAS' MOTION TO
WITHDRAW PETITION FOR DISCRETIONARY REVIEW

The Secretary supports Pocahontas' July 9, 2018 motion to withdraw its appeal in the above-captioned with the following additional facts:

First, Pocahontas has long since paid in full the proposed penalties with respect to both of the Section 104(e) withdrawal orders before the Commission in this case, *i.e.*, Order No. 3576153 (\$5,600) and Order No. 9001636 (\$764).

Second, the agreement between Pocahontas and the Secretary, a copy of which was attached to Pocahontas' motion to withdraw its appeal, does not reduce or otherwise affect any other contested penalties.

Third, for the same reasons the Commission lacks jurisdiction to review the issuance of a notice of pattern-of-violations, as discussed in *Pocahontas Coal*

Company, 38 FMSHRC 176 (2016), the Commission lacks jurisdiction to review the termination of a notice of pattern-of-violations such as that contemplated by the above-referenced agreement between the parties.

CONCLUSION

Accordingly, the Secretary requests that the Commission grant Pocahontas' motion to withdraw its petition for discretionary review in the above-captioned case.

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Solicitor of Labor

APRIL E. NELSON
Associate Solicitor

ALI A. BEYDOUN
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CERTIFICATE OF SERVICE

I certify that on July 17, 2018, I served a copy of the foregoing response to motion to withdraw petition for discretionary review via electronic mail on:

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/s/Edward Waldman
EDWARD WALDMAN
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710

POCAHONTAS COAL COMPANY, LLC)	CONTEST PROCEEDING
)	
Contestant,)	Docket No.: WEVA 2014-395-R
)	Order No.: 3576153; 12/19/13
v.)	
)	
U.S. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA))	
)	
Respondent.)	
)	
U.S. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA))	CIVIL PENALTY PROCEEDING
)	
Petitioner)	Docket No.: WEVA 2014-1028
)	Docket No.: WEVA 2015-854
v.)	
)	
POCAHONTAS COAL COMPANY, LLC)	Mine ID No.: 46-08878
)	Mine: Affinity Mine
Respondent.)	Commission

**POCAHONTAS COAL COMPANY, LLC'S RESPONSE TO COMMISSION'S JULY 19,
2018 ORDER**

Pocahontas Coal Company, LLC ("Pocahontas"), by and through its undersigned counsel, responds to the Federal Mine Safety and Health Review Commission's ("Commission") July 19, 2018, order as follows:

On July 26, 2018, the Secretary of Labor ("Secretary") filed a Response to the Commission's July 19, 2018, Order. In his Response the Secretary elected to remove the seal from his July 17, 2018, Response in Support of Pocahontas' Motion to Withdraw Petition for Discretionary Review and supporting agreement.

Given the Secretary's position, and Pocahontas' desire to move this matter forward, Pocahontas agrees to lift its request to seal its complete July 10, 2018, filing. Pocahontas believes the parties' current positions collectively remove the seal issue from further consideration in this matter.

Accordingly, Pocahontas is providing clean copies of all documents in its July 10, 2018, filing removing the "under seal" designation. Pocahontas respectfully requests the Commission rule on its motion.

Respectfully submitted,

POCAHONTAS COAL COMPANY, LLC
Contestant,

BY COUNSEL

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Date: July 26, 2018

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710**

POCAHONTAS COAL COMPANY, LLC)	CONTEST PROCEEDING
)	
Contestant,)	Docket No.: WEVA 2014-395-R
)	Order No.: 3576153; 12/19/13
v.)	
)	
U.S. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA))	
)	
Respondent.)	
)	
U.S. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA))	CIVIL PENALTY PROCEEDING
)	
Petitioner)	Docket No.: WEVA 2014-1028
)	Docket No.: WEVA 2015-854
v.)	
)	
POCAHONTAS COAL COMPANY, LLC)	Mine ID No.: 46-08878
)	Mine: Affinity Mine
Respondent.)	Commission

CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing **POCAHONTAS COAL COMPANY, LLC'S RESPONSE TO COMMISSION'S JULY 19, 2018 ORDER** upon the parties on the **26th day of July, 2018**, via FMSHRC e-filing and electronic mail (where indicated) to:

Lisa M. Boyd
Executive Director
Federal Mine Safety and Health Review Commission
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, D.C. 20004-1710

The Honorable Margaret A. Miller
Administrative Law Judge
Federal Mine Safety and
Health Review Commission
721 19th St., Suite 443
Denver, Colorado 80202-2500

Ed Waldman
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U.S. Department of Labor
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waldman.edward@dol.gov

s/Jason M. Nutzman
Jason M. Nutzman

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710

POCAHONTAS COAL COMPANY, LLC)	CONTEST PROCEEDING
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Contestant,)	Docket No.: WEVA 2014-395-R
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U.S. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA))	
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U.S. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA))	CIVIL PENALTY PROCEEDING
)	
Petitioner)	Docket No.: WEVA 2014-1028
)	Docket No.: WEVA 2015-854
v.)	
)	
POCAHONTAS COAL COMPANY, LLC)	Mine ID No.: 46-08878
)	Mine: Affinity Mine
)	
Respondent.)	Commission

MOTION TO WITHDRAW PETITION FOR DISCRETIONARY REVIEW

Pocahontas Coal Company, LLC ("Pocahontas"), by and through its undersigned counsel, and pursuant to Federal Mine Safety and Health Review Commission ("Commission") Procedural Rule 10, 29 C.F.R. § 2700.10, and Commission Procedural Rule 11, 29 C.F.R. § 2700.11, hereby moves for an order granting its Motion to Withdraw Petition for Discretionary Review as more fully set forth below.

INTRODUCTION

On October 24, 2013, the Mine Safety and Health Administration (“MSHA”) issued Section 104(e)(1) Written Notice Number 7219153 (“POV Notice”) to Pocahontas’ Affinity Mine alleging a pattern of violations (“POV”) existed at the mining operation. MSHA issued the POV notice pursuant to Section 104(e)(1) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”) (30 U.S.C. § 814(e)(1)). On December 31, 2015, Pocahontas filed with the Commission a Petition for Discretionary Review (“PDR”) pursuant to Commission Procedural Rule 70 (29 C.F.R. § 2700.70). This PDR related to the POV Notice and two decisions issued by Administrative Law Judge on November 3, 2015 and December 24, 2015.

The parties have now negotiated a compromise of this matter and have agreed to resolve the issues raised in Pocahontas’ PDR and the related briefs before the Commission. Accordingly, Pocahontas respectfully moves the Commission for an order granting its Motion to Withdraw Petition for Discretionary Review and states each party will bear its own costs and fees in these proceedings. A copy of the Settlement Agreement is filed separately to this motion as Exhibit 1. Counsel for Pocahontas has informed counsel for the Secretary of its intent to file this motion.

ARGUMENT

Pocahontas seeks to withdraw its PDR based entirely on the terms of the Settlement Agreement between the parties. Commission Procedural Rule 11 provides that “[a] party may withdraw a pleading at any stage of a proceeding with the approval of the Judge or the Commission.” See 29 C.F.R. § 2700.11; see also Fed. R. App. P. 42(b) (noting in part that “[a]n

appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court").¹

Commission precedent sets forth the right of a party to request permission to withdraw its petition for discretionary review. See Speed Mining, Inc., 27 FMSHRC 286 (Mar. 2005) (granting motion to withdraw petition for discretionary review filed pursuant to Commission Rules 10 and 11); Newmont Gold Company, 21 FMSHRC 564 (June 1999) (granting motion to withdraw as it neither disturbed the holdings of the judge nor the penalties assessed); Thunder Basin Coal Company, 1996 WL 354599 (June 1996) (granting unopposed motion to withdraw petition for discretionary review); RNS Services, Inc., 18 FMSHRC 115 (Feb. 1996) (granting unopposed motion to withdraw petition for discretionary review); Jim Walter Resources, Inc., 9 FMSHRC 390 (Mar. 1987) (granting unopposed motion to withdraw petition for discretionary review and to dismiss proceeding); Russell Collins and Virgil Kelley, 5 FMSHRC 1671 (Oct. 1983) (granting motion to withdraw petition for discretionary review).

The Commission has also recognized that a proceeding "no longer present[s] a justiciable controversy" and "[a] case is moot when the issues presented no longer exist or the parties no longer have a legally cognizable interest in the outcome." See Brent Roberts, 20 FMSHRC 1245, 1247-48 (Nov. 1998); see also Youghioghney & Ohio Coal Company, 7 FMSHRC 200 (Feb. 1985) (finding adequate reason to grant motion to dismiss proceeding filed by Secretary after petition for discretionary review filed by operator when "there is no longer a true adversarial contest suitable for judicial resolution").

¹ Commission Rule 1(b) provides that Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure shall apply "so far as practicable" in absence of applicable Commission rules. See 29 C.F.R. § 2700.1(b).

CONCLUSION

For the reasons set forth above Pocahontas requests that the Commission issue an order granting its Motion to Withdraw Petition for Discretionary Review.

Respectfully submitted,

POCAHONTAS COAL COMPANY, LLC
Contestant,

BY COUNSEL

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Date: July 10, 2018

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710**

POCAHONTAS COAL COMPANY, LLC)	CONTEST PROCEEDING
)	
Contestant,)	Docket No.: WEVA 2014-395-R
)	Order No.: 3576153; 12/19/13
v.)	
)	
U.S. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA))	
)	
Respondent.)	
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U.S. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA))	CIVIL PENALTY PROCEEDING
)	
Petitioner)	Docket No.: WEVA 2014-1028
)	Docket No.: WEVA 2015-854
v.)	
)	
POCAHONTAS COAL COMPANY, LLC)	Mine ID No.: 46-08878
)	Mine: Affinity Mine
)	
Respondent.)	Commission

CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing **MOTION TO WITHDRAW PETITION FOR DISCRETIONARY REVIEW** upon the parties on the **10th day of July, 2018**, via FMSHRC e-filing and electronic mail (where indicated) to:

Lisa M. Boyd
Executive Director
Federal Mine Safety and Health Review Commission
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, D.C. 20004-1710

The Honorable Margaret A. Miller
Administrative Law Judge
Federal Mine Safety and
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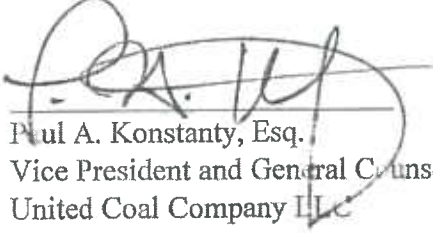
s/ Jason M. Nutzman
Jason M. Nutzman

AGREEMENT

1. This Agreement is being entered into between Pocahontas Coal Company LLC ("Pocahontas") and the Mine Safety and Health Administration ("MSHA") on June 29, 2018 (collectively "Parties").
2. The Parties have agreed to end the matter currently pending before the Federal Mine Safety and Health Review Commission ("Commission") in *Pocahontas Coal Company, LLC v. U.S. Secretary of Labor, Mine Safety and Health Administration (MSHA), WEVA 2014-395-R, et. al.* ("the Proceeding").
3. By entering into this Agreement Pocahontas hereby agrees to file with the Commission a Motion to Withdraw Appeal in the Proceeding.
4. In exchange for Pocahontas filing a Motion to Withdraw Appeal in the Proceeding, and the Commission's issuance of a full, clear, and unambiguous dismissal of the Proceeding, MSHA agrees to immediately terminate Notice of Pattern of Violations Number 7219153 issued at the Affinity Mine on October 24, 2013, and provide prompt written acknowledgment of the same to Pocahontas.
5. The Commission's refusal to fully dismiss the Proceeding renders this Agreement null and void and the parties shall be returned to their original positions in the Proceeding, prior to entering this Agreement, to include waiting on consummation of Pocahontas' appeal before the Commission, any remand or direction by the Commission, or any additional appeals to the United States Court of Appeals and beyond.
6. The Parties will bear their own attorney's fees and litigation expenses for the Proceeding.
7. The Parties agree to keep the contents of this Agreement confidential until such time as the Commission issues a full, clear, and unambiguous dismissal of the Proceeding.

8. The parties agree to execute this Agreement in Counterparts.

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Jason M. Nutzman, Esq.
Attorneys for Pocahontas Coal Co., LLC



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United Coal Company LLC

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Solicitor of Labor

April E. Nelson
Associate Solicitor

Ali A. Beydoun
Counsel, Appellate Litigation

Edward Waldman
Attorney

Attorneys for the Secretary of Labor,
Mine Safety and Health
Administration

8. The parties agree to execute this Agreement in Counterparts.


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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

POCAHONTAS COAL COMPANY, LLC

AUG 28 2018

: Docket Nos. WEVA 2014-395-R
: WEVA 2014-1028
: WEVA 2015-854
:
:
:

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

ORDER

BY: Althen, Acting Chairman; Jordan and Young, Commissioners

These cases involve a notice of contest and two civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012). On December 31, 2015, Pocahontas Coal Company, LLC ("Pocahontas") filed a petition for discretionary review ("PDR"), which the Commission granted. On July 10, 2018, Pocahontas filed a motion to dismiss its PDR. On July 17, 2018, the Secretary of Labor filed a response in support of Pocahontas' motion.

Upon consideration of Pocahontas' motion and the Secretary of Labor's response, the direction for review issued by the Commission is hereby VACATED and Pocahontas' appeal is DISMISSED. The Administrative Law Judge's summary decision is final and unappealable.¹


William I. Althen, Acting Chairman


Mary Lu Jordan, Commissioner


Michael G. Young, Commissioner

¹ These pleadings were initially labeled "under seal." In an Order issued on July 19, 2018, the Commission directed the parties to explain why the documents had been designated as such. The Secretary's response explained that he had been unaware that Pocahontas was going to file its motion under seal and did not believe there was any reason for such designation. Pocahontas agreed to lift its request to seal its prior filing.

Commissioner Cohen, dissenting:

Although Pocahontas Coal Company's motion to the Commission nominally seeks merely to withdraw the operator's appeal of this matter and gain dismissal of the proceedings, the parties' filings make clear that Pocahontas's request is part of a broader agreement in which the Secretary of Labor ("Secretary") seeks to unilaterally relieve Pocahontas's Affinity Mine of its pattern of violations designation. Such a settlement is directly contrary to the express language of the Mine Act and the Secretary's own regulations, and approving the settlement only provides cover for an unlawful agreement by the current administration. I dissent.

I.

Section 104(e) of the Mine Act, 30 U.S.C. § 814(e), sets forth the provisions for the Mine Safety and Health Administration's ("MSHA's") issuance and termination of a notice of pattern of violations ("POV").¹ *Pocahontas Coal Co.*, 38 FMSHRC 176, 177 (Feb. 2016). Under those provisions, if an operator has demonstrated a pattern of violating mandatory health or safety standards, MSHA inspectors "shall issue an order" withdrawing miners from the area affected by any discovered significant and substantial ("S&S") violation.² 30 U.S.C. § 814(e)(1). Section 104(e)(3) provides the method by which a mine may exit from the POV provisions:

If, upon an inspection of the entire coal or other mine, an authorized representative of the Secretary finds no violations of

¹ Section 104(e)(1) provides:

If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists. If, upon any inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, the authorized representative shall issue an order requiring the operator to cause all persons in the area affected by such violation . . . to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(e)(1).

² An "S&S" violation is a serious violation which is "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1).

mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine health and safety hazard, the pattern of violations that resulted in the issuance of a notice under paragraph (1) shall be deemed to be terminated and the provisions of paragraphs (1) and (2) shall no longer apply.

30 U.S.C. § 814(e)(3). The Secretary's regulations on termination of a pattern of violations notice effectively repeats the statute. *See* 30 C.F.R. § 104.4(a); Pattern of Violations, 78 Fed. Reg. 5,056 (Jan. 23, 2013) ("The final POV rule . . . [m]irrors the provision in the Mine Act for termination of a POV.").

II.

In this case MSHA notified Pocahontas that a pattern of violations existed at its Affinity Mine pursuant to section 104(e) of the Mine Act, and issued Written Notice No. 7219153 on October 24, 2013. The Notice charged two separate patterns. One of the alleged patterns included 24 separate S&S roof and rib support citations and orders issued within the preceding 12-month period. The other alleged pattern included 16 separate S&S citations and orders involving emergency preparedness and escapeway hazards issued within the preceding 12-month period. Sec'y Memo of Point & Auth. in Support of Mot. for Part. S.D. at 14-15, 24.

MSHA began issuing withdrawal orders pursuant to section 104(e) of the Mine Act, and these were contested by Pocahontas.³ Pocahontas filed a motion for summary decision and the Secretary filed a motion for partial summary decision. On November 3, 2015, a Commission Judge issued an "Order Denying Pocahontas' Motion for Summary Decision and Granting the Secretary's Motion for Partial Summary Decision." 37 FMSHRC 2654 (Nov. 2015) (ALJ). The Judge found that the Secretary had proven the existence of a pattern of violations at the Affinity Mine, and upheld the validity of POV Written Notice No. 7219153. *Id.* at 2673. After the Judge issued a subsequent Summary Decision affirming two section 104(e) orders predicated on the POV notice, the Commission granted Pocahontas's petition for discretionary review. Then, after the case was fully briefed, Pocahontas submitted its "Motion to Withdraw Petition for Discretionary Review", which included – and was expressly dependent on the approval of – a proposed settlement agreement between Pocahontas and the Secretary.

The parties' settlement agreement in this matter provides:

4. In exchange for Pocahontas filing a Motion to Withdraw Appeal in the Proceeding, and the Commission's issuance of a full, clear, and unambiguous dismissal of the Proceeding, MSHA agrees to immediately terminate Notice of Pattern of Violations Number 7219153 issued at the Affinity Mine on October 24, 2013, and

³ Pocahontas also directly contested the issuance of the POV notice itself, but the Commission ruled that it does not have jurisdiction to review a direct challenge to a POV notice independent of a section 104(e) withdrawal order. *Pocahontas*, 38 FMSHRC at 185.

provide prompt written acknowledgement of the same to Pocahontas.

Pocahontas Mot. at Ex. 1. The motion makes no mention of the statutory provision for obtaining relief from a POV notice. The Secretary's response in support of Pocahontas's motion is similarly silent toward the law's plain requirement that Pocahontas pass an inspection free of any S&S citations before it can be relieved of the POV designation. There is no indication that Pocahontas's Affinity Mine has received such a clean inspection.⁴ Rather than providing a clear indication to the Commission that the parties are proceeding within the framework of the Mine Act, the parties attempted to shield their actions from the public by initially filing pleadings before us in secret (i.e., "under seal").⁵

III.

Lacking any evidence that Pocahontas's Affinity Mine has passed an entire inspection without receiving any S&S citations, the parties' settlement agreement is legally unsupportable. Congress directed that when a mine is in POV status, "a withdrawal order *shall be issued*" for "any violation of a mandatory health or safety standard" that is S&S. 30 U.S.C. § 814(e)(2) (emphasis added). The plain meaning of this language, combined with the express enumeration of the method by which an operator may exit from the POV provisions, forecloses other avenues of relief.

The legislative history supports this plain reading of the language. The Senate Report on the Mine Act explains that an operator that has received its first withdrawal order from the POV provisions "is subject to the issuance of further [POV] withdrawal orders until an inspection of

⁴ Indeed, MSHA's Mine Data Retrieval System indicates that federal mine inspectors issued section 104(e)(2) withdrawal orders for S&S violations at the Affinity Mine in August 2018. See MSHA, *Mine Data Retrieval System: Mine Citations, Orders, and Safeguards*, <https://arlweb.msha.gov/drs/ASP/MineAction.asp> (searchable by mine name).

⁵ Although courts may place documents filed with them under seal to protect sensitive information, federal courts have recognized the common law right of public access to public records and documents, including judicial records. See *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597–98 (1978). Such access is critical to allow the public and the press to keep a watchful eye on the workings of public agencies. Here, Pocahontas filed its Motion to Withdraw Petition for Discretionary Review publicly, but the motion stated, "[a] copy of the Settlement Agreement is filed separately under seal to this motion as Exhibit 1." Mot. at 2. A week later the Commission received the "Secretary's Response in Support of Pocahontas' Motion to Withdraw Petition for Discretionary Review", on which was imprinted "*FILED UNDER SEAL*". Upon receipt of the parties' filings in this matter, the Commission issued an order directing the parties to "explain how sealing these pleadings is consistent with Congressional intent that settlements under the Federal Mine Safety and Health Act of 1977 take place with sufficient transparency so that the public will be aware of the process." July 19, 2018 Ord. at 1. In response, the Secretary and Pocahontas filed pleadings removing the "under seal" designation from their previous filings. Neither Pocahontas nor the Secretary have ever explained or attempted to provide justification for their attempt to shield the Settlement Agreement from the public in a cloak of secrecy.

the mine in its entirety discloses no violations of any safety and health standards which could significantly and substantially contribute to the cause and effect of a mine health or safety hazard.” S. Rep. No. 95-181, at 32-33 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 620-21 (1978) (“*Legis. Hist.*”).⁶ The report further elaborates that section 104(e)(3) requires “an inspection of the mine in its entirety in order to break the sequence of the issuance of orders.” *Id.* at 622.

Congress limited the method for ending POV status for good reason. In enacting the pattern of violations provisions, Congress provided the Secretary with its most powerful tool for protecting the lives of the nation’s miners. Congress explicitly recognized that the POV provisions were necessary to “provide an effective enforcement tool to protect miners when the operator demonstrates [its] disregard for the health and safety of miners through an established pattern of violations.” *Id.* at 620. Congress thus recognized that the POV designation was necessary to ensure compliance with safety regulations at those mines where the other tools in the Mine Act’s graduated enforcement scheme proved insufficient to curb an operator’s dangerous behavior. The POV designation signals to an operator that “the mere abatement of violations as they are cited is insufficient.” *Id.* at 621.

Congress determined such a powerful enforcement tool was necessary after the investigation of the 1976 Scotia mine disaster revealed that the mine had a recurring history of violations that the existing enforcement scheme had failed to address. *Id.* at 620. But for 35 years, MSHA utterly failed to successfully exercise its authority under the POV provisions. *See* 78 Fed. Reg. at 5,058 (Jan. 23, 2013). The Secretary did not even issue regulations implementing the POV provisions until 1990. *See* Pattern of Violations, 55 Fed. Reg. 31,128 (July 31, 1990). The 1990 rule contained gaping holes. It counted only citations that had become final orders of the Commission. 30 C.F.R. § 104.3(b) (1990). And when screening of the final orders identified mines that had a pattern of disregarding safety regulations, MSHA first provided those chronically unsafe operators with warning letters of their “potential” POV (“PPOV”) and an opportunity to improve prior to receiving a POV notice. 30 C.F.R. § 104(a) (1990); 78 Fed. Reg. at 5,058. As described below, unscrupulous operators such as Massey Energy manipulated the system, putting profit above the safety of their miners.

Following the disasters at the Sago, Darby, and Aracoma mines in 2006, MSHA began to develop new screening criteria to better identify mines with recurring safety issues. Even then, however, enforcement of the POV provisions was completely ineffective. After the catastrophic explosion at the Upper Big Branch Mine in April 2010, the Secretary’s Office of Inspector General (“OIG”) conducted a performance audit to evaluate MSHA’s implementation of the pattern of violations authority conferred under section 104(e) of the Mine Act. The results of the audit were distinctly summarized in its title: “In 32 Years MSHA Has Never Successfully Exercised Its Pattern of Violations Authority.” U.S. Dep’t of Labor, O.I.G. Report No. 05-10-005-06-001. The OIG Report stated that during the 32 years since passage of the Mine Act,

⁶ In contrast, the legislative history makes clear that Congress intended to give the Secretary “broad discretion in establishing criteria for determining when a pattern of violations exists.” *Legis. Hist.* at 621.

MSHA had only once issued a POV notice to an operator. *Id.* at 2. In that one instance, the Commission subsequently modified some of the citations and orders on which the POV notice was based, and as a result, MSHA did not enforce the order. *Id.* at 4. The report included several recommendations, the first of which was: “Evaluate the appropriateness of eliminating or modifying limitations in the current regulations, including the use of only final orders in determining a pattern of violations and the issuance of a warning notice prior to exercising POV authority.” *Id.* at 24; *see also Brody Mining, Inc.*, 36 FMSHRC 2027, 2030 (Aug. 2014).

The cogency of the OIG Report is illustrated by the Mine Act enforcement history leading up to the deadly explosion at Massey Energy’s Upper Big Branch Mine. As noted by Commissioner Young and me in *Brody Mining*, 36 FMSHRC at 2040-41 n. 11, in 2007 MSHA put Upper Big Branch on a PPOV because its S&S rate was 11.6 per 100 inspection hours. The mine then got an improvement plan, and lowered its S&S rate to 5.6 per 100 inspection hours. Since this was a greater than 30% reduction, MSHA withdrew the POV threat pursuant to the then-existing regulations. With the threat gone, the mine’s S&S rate went back up.⁷ Thus, Upper Big Branch management evaded a pattern of violations notice by bringing down its rate of S&S violations after receiving a PPOV and achieved removal from that status. It then reverted to its prior behavior, incurring an excessive number of S&S violations after the POV threat was lifted. If management had the ability to dramatically reduce the rate of S&S violations, it obviously had the ability to maintain a reduced level. It chose not to do so, and thus endangered the lives of miners.⁸ The deaths of 29 miners would probably have been avoided if the Secretary had enforced the pattern of violations provisions of the Mine Act as Congress intended.

The Upper Big Branch disaster and the subsequent OIG Report compelled the Secretary to amend its POV regulations to close the loophole operators had relied upon to evade a POV notice. With the changes in 2013, MSHA finally established an effective implementation of the POV regulations, screening mines on an open database and considering all of an operator’s pending S&S citations.⁹

⁷ In the next screening cycle, Upper Big Branch would have received another PPOV notice except for an MSHA computer error. U.S. Dep’t of Labor, Internal Review of MSHA’s Actions at the Upper Big Branch Mine-South, Performance Coal Co., at 56-57 (Mar. 6, 2012), <https://www.msha.gov/PerformanceCoal/UBBInternalReview/UBBInternalReviewReport.pdf>.

⁸ The mine’s former superintendent pled guilty to conspiring to hide safety violations from MSHA inspectors, and Massey Energy’s chief executive ultimately was convicted of conspiring to willfully violate mine safety regulations. *U.S. v. Blankenship*, 846 F.3d 663, 666-67 (4th Cir. 2017).

⁹ The Commission has affirmed the key aspects of the Secretary’s updated POV regulations. *Brody Mining*, 36 FMSHRC at 2054 (holding that POV regulations are facially valid), *appeal dismissed*, No. 14-1171 (D.C. Cir. Nov. 2, 2015); *Brody Mining, LLC*, 37 FMSHRC 1914, 1924 (Sep. 2015) (finding the Secretary’s implementing regulations and definition of “pattern” consistent with section 104(e) of the Mine Act).

IV.

The POV screening criteria are extremely restrictive, and capture only a handful of mines. But, because of their deterrent effect, the positive impact on mine industry safety has been much broader, with a sharp reduction in the number of total violations and S&S violations and an even sharper drop in the number of operators that chronically violate safety standards. News Release, Mine Safety and Health Administration, MSHA Chief: Pattern of Violations Reforms Have made Mines Safer (Oct. 2, 2014), <https://www.dol.gov/newsroom/releases/msha/msha20141867>. At last, vigorous enforcement of the POV provisions as Congress intended has had the intended effect of reducing the number of the violations that are most dangerous to miners.

In releasing the Affinity Mine from its POV notice without Pocahontas first satisfying the statutory requirement of an S&S-free inspection, the Secretary threatens to undermine the positive impact of these now-effective POV regulations. Abandoning the POV regulation's strict application sends the dangerous message that an operator who has chronically disregarded safety, thus gaining an unfair advantage over safer competitors in the process, may nevertheless obtain reprieve from the Mine Act's heaviest sanctions by the grace of a friendly administration no longer committed to enforcing those sanctions. That message endangers miners. Already in 2017, we witnessed deaths among coal miners nearly double from 2016 despite sagging activity in the mining industry. *See* U.S. Dep't of Labor, MSHA, 2018 Comparison of Year-to-Date and Total Fatalities for M/NM & Coal (Jun. 5, 2018), <https://arlweb.msha.gov/stats/daily-bar-chart.pdf>.

The Secretary's illicit reconsideration of Pocahontas's POV status is not the only threat to undermine the current POV regulations. For over a year, the administration has engaged in settlement negotiations with mining industry groups challenging the Secretary's POV rulemaking. *See Ohio Coal Ass'n v. Perez*, No. 2:14-cv-2646 (S.D. Ohio May 9, 2017) (order granting stay of proceedings for parties to engage in settlement negotiations). Any settlement that alters the key elements of the current POV regulations could again relegate those critical provisions of the Mine Act to dormant status.

I recognize that the POV notice has been in effect at Pocahontas's Affinity Mine for five years. Reasonable minds may disagree over whether the enhanced enforcement for such a period of time is sufficient and withdrawal of the POV notice appropriate. But that is a question of policy, which is a matter for Congress to determine. In enacting the Mine Act, Congress did not allow for such a discretionary reprieve.¹⁰ If the Secretary wishes to alter the terms of the Mine

¹⁰ The Secretary suggests that the termination of a POV notice is committed to his discretion, and therefore not subject to review. Sec'y Resp. to Mot. to Withdraw PDR at 1-2. However, this matter is within the jurisdiction of the Commission by virtue of the pending appeal from the Judge's Decision. Moreover, although an agency's decision not to take enforcement action may be presumed immune from judicial review, "presumptively unreviewable" expressions of prosecutorial discretion nonetheless "may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Heckler v. Chaney*, 470 U.S. 821, 831-33 (1985). The plain language and statutory history of the Mine Act make clear that the Secretary here cannot refuse to issue withdrawal orders for

Act, he may propose such changes to Congress where the issue may be debated and considered in the public eye. Such dramatic deviations from the plain meaning of the law should not be attempted in discrete filings made "under seal" before the Commission.

In passing the Mine Act, Congress declared that "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner." 30 U.S.C. § 801(a). In seeking to abandon the POV provisions at the Affinity Mine, this administration threatens to subvert the first principle of the Mine Act.

The de facto settlement of this matter directly conflicts with the plain language of section 104(e) of the Mine Act. As an independent agency charged with reviewing enforcement actions brought by the Secretary, this Commission should not assent to such an illegal act. To the extent that the Commission's dismissal of these proceedings provides cover to the administration's corrupted reading of the law, I dissent.



Robert F. Cohen, Jr., Commissioner

S&S violations at a mine that has been placed on a POV notice and has not yet passed a full inspection without the issuance of an S&S citation.

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Bloomberg News

Coal Company's Pattern of Violations Likely Sent Back to Judge

A judge will likely have to reconsider a notice of pattern of violations allegation brought by the federal mine safety regulator against Pocahontas Coal Co.

Bloomberg News

July 13, 2017

Coal Company's Pattern of Violations Likely Sent Back to Judge

By Lars-Eric Hedberg

A judge will likely have to reconsider a notice of pattern of violations allegation brought by the federal mine safety regulator against Pocahontas Coal Co.

A notice of pattern of violations could prove serious if the Mine Safety and Health Administration finds a significant and substantial violation at the mine within 90 days of the notice, because the agency would issue a withdrawal order shutting down the mine.

The Dodd-Frank Act requires mining companies to include information about mine safety and health, such as notices of a pattern of violations or the potential to have a pattern of violations under the Mine Act, in quarterly and annual reports they file with the Securities and Exchange Commission.

Although they weren't in complete agreement, three members of the Federal Mine Safety and Health Review Commission said in a July 13 meeting that an administrative law judge incorrectly ruled the Department of Labor proved a pattern violations existed at Pocahontas' Affinity mine in West Virginia. They would vacate the judge's grant of summary decision (Pocahontas Coal Co. v. Sec'y of Labor, FMSHRC, No. WEVA 2014-395-R, meeting 7/13/17).

POV Criteria, Issuance Challenged

MSHA adopted its new pattern of violation rule in January 2013 and two screening criteria in March. The agency conducted a computerized screening of 14,600 mines under its jurisdiction from September 2012 through August 2013 and concluded the mine met one of criteria because, among other things, at least 50 citations were designated significant and substantial—and a quarter of these were the result of high negligence or reckless disregard.

A pattern of violation panel of senior MSHA employees determined a corrective action plan submitted by the company was insufficient as mitigation, and recommended a notice be issued. Attorneys and inspectors identified two patterns of violations—24 S&S violations contributing to roof and rib hazards and 16 S&S violations contributing to emergency preparedness and escape way hazards during the preceding year. Two of these were later modified to non-S&S.

MSHA issued the notice to Pocahontas in October 2013. Administrative Law Judge Margaret A. Miller found that the procedures were adequate and the department proved a pattern of violations.

Full Adjudication Needed

Commissioner Robert Cohen said MSHA did not abuse its discretion in issuing the notice, but that he was inclined to remand so the department can prepare a case with qualitative components, aligning with review commission precedent.

Under 30 C.F.R. 104.2(a), other information that demonstrates a serious safety or health management problem at the mine and mitigating circumstances are among factors MSHA reviews in deciding whether a mine has a pattern.

"Maybe a certain number of citations by itself is enough as a matter of law, but I'm not sure we want to approach it this way," he said. "The secretary needs quantitative and qualitative factors. Section 104(e) is nuclear for the industry."

Commissioner Michael Young said the decision to issue the notice was left to agency discretion, but he would vacate and remand for a hearing to have the matter fully adjudicated.

He also said Miller committed prejudicial and reversible error by discussing 11 accidents at the mine in her opinion, when the secretary had not made a case linking their nature and relationship to the establishment of a pattern.

Chairman Robert Althen said the eight criteria needed to be considered and the secretary bore the burden of presenting evidence. He also said that he will consider granting Pocahontas' motion for summary decision.

Commissioner Mary Lu Jordan said she would affirm based on the number of citations, which "sustain, support the pattern."

POV Rule Challenge Pending

The U.S. District Court for the Southern District of Ohio stayed in May a facial industry challenge to the pattern of violations rule to allow mine operators, mining groups, and the agency to negotiate a settlement. Those discussions are ongoing.

The final rule (78 Fed. Reg. 5056), which is the subject of Pocahontas' as applied challenge, eliminates the potential pattern of violations notice, which MSHA has used under the 1990 rule to commence the process that could ultimately lead to a notice. Unlike the previous rule, the new rule also allows MSHA to consider S&S citations that are not final orders for purposes of issuing a notice of pattern of violations. MSHA had issued two-thirds of Pocahontas' S&S citations while the old rule was in effect, but they were considered in MSHA's pattern of violations analysis under the new rule.

Among other things, the plaintiffs in the rule challenge claim that MSHA and the secretary of labor violated the Administrative Procedure Act by failing to consider economic implications and the rate at which significant and substantial violations are overturned.

They also allege that the screening criteria amount to a legislative rule, and therefore require notice and comment rulemaking—a position Althen echoed in his discussion.

Dinsmore & Shohl, LLP, Washington and Charleston, W. Va., represents Pocahontas.

The Department of Labor, Office of the Solicitor, represents the secretary.

<https://www.bna.com/coal-companys-pattern-n73014461716/>